No. 14718

In the United States Court of Appeals for the Ninth Circuit

PAUL M. BROPHY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

MOTION TO STRIKE AND MEMORANDUM IN SUPPORT

SUBJECT INDEX

CITATIONS

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MOTION TO STRIKE

Comes now the United States of America acting by and through J. LEE RANKIN, Assistant Attorney General, and WILLIAM H. VEEDER, Attorney, Department of Justice, and moves:

To strike the "Amicus Curiae Brief" and the "Brief of Appellant in Answer to that of Amicus Curiae."

There were received in the Department of Justice from counsel for the Appellant on January 3, 1956, and from the United States Attorney on December 30, 1955, copies of the Brief of Appellant In Answer to That of Amicus Curiae, the effect of which, when read in the light of the Brief of Amicus Curiae, would inject in this appeal issues entirely foreign to the appeal, concerning which Appellant has not sought review.

WHEREFORE, the United States of America respectfully moves this Honorable Court to strike both the Brief of Amicus Curiae and Appellant's Brief in Answer to that of Amicus Curiae, all as more fully reviewed in the accompanying memorandum of points and authorities in support of this motion.

Dated this 5th day of January, 1956.

UNITED STATES OF AMERICA,

/s/ J. Lee Rankin

J. LEE RANKIN,
Assistant Attorney General.

/s/ William H. Veeder

WILLIAM H. VEEDER,
Attorney, Department of Justice.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE

FACTS

PRELIMINARY STATEMENT

This Honorable Court is respectfully requested to consider the Motion to Strike and this memorandum in support of that motion in the light of the following facts:

1. The United States of America, Appellee, in accordance with the rules of this Honorable Court responded fully to the Opening Brief of Appellant;

2. No reply to the brief of the United States of America was filed by Appellant;

3. Amicus Curiae, subsequent to the filing of the response by the United States of America, filed a brief injecting matters into this appeal which Appellant did not raise on appeal;

4. Though no reply to the Brief for the United States, Appellee, was filed by Appellant, there never-

theless was received in the Department of Justice from Appellant on January 3, 1956, and from the United States Attorney on the 30th day of December, 1955, the Brief of Appellant in Answer to That of Amicus Curiae, purporting to join issue with Amicus Curiae respecting matters entirely foreign to this appeal. The brief of Amicus and Appellant's reply to Amicus purport to change completely the nature of the appeal and to request this Court for an advisory opinion respecting matters which are not before it.

Engendered by Amicus and Appellant by the course which they have pursued as a result which can have no other effect than severely to prejudice the interests of the United States of America, Appellee, and confuse the issues before this Court upon appeal.

QUESTION PRESENTED

Whether Amicus Curiae and Appellant may have resolved by this Court issues which are not presented on appeal?

ARGUMENT

Amicus curiae by its brief and appellant by the reply to it have joined issue respecting matters not before this Court and request an advisory opinion on three questions which are not presented on appeal

That advisory opinions may not be rendered by the Federal judiciary has been declared by the highest Court in these explicit terms: "This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are sub-

ject to later review or alteration by administrative action."[1] When the express questions by Amicus are subsequently reviewed it will be observed how clearly response to them would be violative of the last quoted doctrine. Comment respecting other facets of that sound principle which prohibits advisory opinions of the character sought here warrants consideration. Basis for the prohibitory rule is the provision of the Constitution establishing the Judicial Branch of the Central Government. There it is provided that: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[2] Provision is further made that: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * * to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[3]

Chief Justice Marshall very early in our country's history reviewed the provisos of the organic law which have just been quoted, discussing in great detail the

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[1] *Chicago & Southern Airlines* v. *Waterman Steamship Corp.*, 333 U. S. 103, 114 (1948).

[2] Constitution of the United States, Article III, Section 1.

[3] Constitution of the United States, Article III, Section 2.

effect of them and declaring against advisory opinions by the Constitutional Courts of our Nation.[4] That case has been frequently cited and is authority for the principle that the Federal Judiciary established pursuant to the Constitution may exercise its Constitutional powers only "* * * when a proper case between opposing parties was submitted for judicial determination; * * *."[5] Innumerable other cases reiterate and reaffirm that tenet of the law leaving no doubt as to its immutability.[6]

Irrespective, however, of the fact that this Court could not render an advisory opinion, these questions, extraneous to the appeal, are presented to it by Amicus for review:

"(1) Do applicable contracts, legislation and Court decree relating to the San Carlos Project in and of themselves prohibit a landowner of that project from drilling and operating his own individual irrigation well on the lands of such project, or may the project landowner perform such acts except when prohibited from doing so by express order, rule or regulation of the Secretary of the Interior?"[7]

That quoted question is neither before this Court on appeal nor is it relevant. Appellant admits that the Landowners' Agreement prohibits the drilling and operation of a well of the character giving rise to this

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[4] *Marbury* v. *Madison*, 5 U. S. 137, 172 et seq. (1803).

[5] *Muskrat* v. *United States*, 219 U. S. 346, 357 (1910).

[6] *United Public Workers of America* v. *Mitchell*, 330 U. S. 75, 89 (1947); *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 423 (1940).

[7] Amicus Curiae Brief, page 9, question 1.

litigation, asserting, however, that the prohibition contained in that document becomes effective only when a valid regulation or order has been promulgated by the Secretary of the Interior, the promulgation of which, asserts the Appellant, has not taken place.[8]

Controlling, however, is this fact:

> The trial court adjudged and decreed that "The 'Landowners Agreement' itself, when construed in the light of the statutes and contracts providing for the construction of San Carlos Project, *without any implementing orders or regulations made by the Secretary of the Interior, makes it unlawful for the defendant to drill or operate a well for irrigation purposes.*"[9] [Emphasis supplied.]

That conclusion of law is not presented for review on appeal. Rather as pointed out in the brief of the United States, Appellee, the Appellant alludes only to the "Landowners Agreement" choosing to ignore the fact that the trial court based its conclusion upon not only the "Landowners Agreement" but upon all the contracts and laws which relate to the irrigation project in question.[10]

This is the second inquiry Amicus presents to the Court for an advisory opinion:

"(2) If the drilling and operation of such a well is proper in the absence of prohibition by Secretarial order, rule or regulation, has the Secretary of the In-

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[8] Appellant's Opening Brief, Specification of Error, page 4.

[9] R. 115, Conclusion of Law No. 5.

[10] Please refer to Brief of the United States, Appellee, pages 8 and 9.

terior made such an order, rule or regulation with reference to appellant's well?" [11]

Let this fact be respectfully emphasized as the complete answer to the question presented by Amicus: The trial court has rendered an opinion answering it affirmatively.[12]

There is unchallenged a judgment of the trial court from which Appellant has not appealed, declaring in uneqivocal terms that Appellant is prohibited by the Landowners' Agreement itself from drilling the well giving rise to this litigation—that the Landowners' Agreement in the light of the statutes and contracts providing for the construction of the San Carlos Project "*makes it unlawful for the defendant* [appellant] *to drill or operate a well for irrigation purposes*"; that irreparable and continuing injury and damage to the United States of America emanates from the unlawful drilling of the well by Appellant causing to be entered an injunction against the Appellant.[13]

Finally Amicus presents this question, no mention of which is made in Appellant's brief:

"(3) Did the lower Court have jurisdiction to entertain this action?" [14]

Response to that question is, of course, set forth in the brief of the United States of America, Appellee,[15] where the act conferring jurisdiction on the trial

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[11] Amicus Curiae Brief, page 10, question 2.

[12] See Conclusion of Law No. 5, R. 115, set forth immediately above.

[13] R. 114, Finding of Fact No. 11.

[14] Amicus Curiae Brief, page 10, question 3.

[15] Brief for the United States, Appellee, page 1.

court is in part quoted as follows: "* * * the district courts shall have original jurisdiction of all civil actions, suits, or proceedings commenced by the United States * * *."[16] That the United States "commenced" the suit cannot be denied; equally clear is the fact that judgment was entered by the trial court in favor of the United States enjoining the irreparable damage caused by Appellant.

Amicus curiae alludes to and relies upon matters outside of the record which have no bearing in this appeal

Throughout the brief of Amicus Curiae references are made to purported excerpts from Congressional reports and other sources relating to the San Carlos Federal Irrigation Project.[17] October 27, 1955, is the date of certain material included in the brief of Amicus Curiae and relied upon by it.[18] As judgment for the United States of America was entered August 27, 1954, those extraneous matters are not and could not be relevant at this time. Further that and the related data contained in the appendices, which is largely legislative history, is in no way germane to the issues presented by Appellant on this appeal. Those issues are spelled out with clarity in the Specification of Error contained in Appellant's brief. They are:

> "The District Court erred in rendering judgment in favor of the plaintiff and in denying defendant's motion for new trial because:
>
> "(a) The amended complaint fails to state a claim upon which relief can be granted; and

[16] 28 U. S. C. 1345.

[17] Appendices I, II, III, IV and V.

[18] Appendix V.

> "(b) The 'Landowners' Agreement' ('Exhibit A' annexed to plaintiff's amended complaint, Tr. 20–50) contains no prohibition against the installation and operation of the defendant's well and pump, unless and until there shall have been promulgated a valid regulation or order by the Secretary of the Interior prohibiting or restricting the use of such well and pump; and there has been no such regulation or order." [19]

Emphasized by the United States of America in its brief [20] is the principle that the four corners of an appeal are established by Appellant's "specification of error." [21] As the brief of the United States of America reveals, this Court has repeatedly declared that there is an abandonment on appeal of those matters which are not contained in the specification of errors or in any way alluded to in the brief. That tenet of appellate practice is entirely ignored by Amicus and Appellant as they proceed far afield in their respective briefs presenting alleged issues which are not involved in this appeal. Appellant makes no mention in the Opening Brief of the "Repayment Contract," a covenant heavily relied upon by the trial court in its findings of fact and conclusions of law.[22] Repeated reference in the brief of the United States was made to the "Repayment Contract" and there stress was placed upon the importance of that document ignored by Ap-

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[19] Opening Brief of Appellant, page 4.

[20] Brief for the United States, Appellee, page 9.

[21] Brief for the United States, Appellee, page 9.

[22] R. 112, Findings of Fact Nos. 6 and 7; R. 114, 115, Conclusions of Law.

pellant.[23] Irrespective of the fact that Appellant chose not to reply to the brief of the United States in which the importance of the "Repayment Contract," statutes and laws relating to the San Carlos Federal Irrigation Project is alluded to, Appellant nevertheless seizes upon the brief of Amicus and makes reply to it. This wholly foreign question is raised by Appellant in the reply to Amicus: "Can it be successfully contended that the United States of America and San Carlos Irrigation & Drainage District can effectively enter into a contract abrogating the rights of Paul Brophy under the 'Landowners' Agreement'?"[24] That alleged issue presented in the quoted inquiry reveals the seriousness of the diversion from the principal issues here on appeal. Nowhere in Appellant's brief or in that of the United States of America will there be found a reference to such an inquiry. Moreover, that question is not relevant in any manner by reason of the fact that the court below made no ruling in regard to the question, made no reference to the existence of it and in no manner purported to consider it as it was not an issue in the litigation.

It is respectfully submitted that to consider the foreign issues presented by Amicus and Appellant would be plain and serious error, for as declared throughout, they are in no way relevant to the appeal

[23] Brief for the United States, Appellee, pages 6 et seq.

[24] Amicus Curiae Brief, page 23; Attempted response of Appellant in Answer to that of Amicus Curiae, page 4.

which is before this Court. Free from doubt are these facts:

> Had Appellant considered valid issues contained in the above quoted question,[25] they would have been most assuredly presented on appeal, which they were not;
>
> Had the trial court been called upon to resolve the issues thus created, it would have done so, but it did not.

To control an appeal or any part of it; to present issues which have not been joined by the principal parties litigant as is here attempted are not the functions of Amicus Curiae

Misconceiving the function of Amicus Curiae, the brief that it has filed, as emphasized above, presents issues which the principal parties litigant have not joined in this appeal. An attempt by Amicus Curiae to form these issues and the Appellant to answer them creates an anomaly not countenanced by the law. It has been authoritatively declared that "[Amicus Curiae] has no control over the suit * * * cannot assume the function of a party in an action * * *."[26] Moreover, an micus curiae, as a "friend of the court" has no status except to advise the court "* * * they are not parties to, and they are not bound by, the decree. They are without standing here to appeal."[27]

Consistent with the rules above cited as to the limitations upon the function of an amicus curiae, it has

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[25] Brief of Appellant in Answer to that of Amicus Curiae, page 4.

[26] 2 Am. Jur., Amicus Curiae, Sec. 4, page 680.

[27] *Winter Haven* v. *Gillespie*, 84 F. 2d 285, 287 (C. A. 5, 1936); cert. denied 299 U. S. 606 (1936); rehearing denied 301 U. S. 714 (1936); 13 Cyc. Fed. Proc. 3d ed., 58.16.

been declared that "An amicus curiae can neither take upon himself the management of the cause as counsel" or otherwise participate in the issues as has been attempted by Amicus in this cause.[28]

It is thus abundantly manifest in the light of the cited authorities that Amicus Curiae and Appellant may not formulate issues extraneous to the appeal.

CONCLUSION

This Honorable Court is respectfully requested to grant the motion to strike of the United States of America thus eliminating the issues which Amicus and Appellant seek to present in this cause but which are entirely foreign to the appeal.

UNITED STATES OF AMERICA,

/s/ J. Lee Rankin

J. LEE RANKIN,
Assistant Attorney General.

/s/ William H. Veeder

WILLIAM H. VEEDER,
Attorney, Department of Justice.

Dated: Jan. 5th, 1956

[28] *State* v. *McDonald*, 63 Ore. 467, 128 Pac. 835, 837 (1912).

U. S. GOVERNMENT PRINTING OFFICE: 1956